ARKANSAS SUPREME COURT

No. CR 06-1115

NOT DESIGNATED FOR PUBLICATION

RONNIE L. GARRETT
Appellant

v.

STATE OF ARKANSAS
Appellee

Opinion Delivered **November 16, 2006**

PRO SE MOTION FOR EXTENSION OF TIME TO FILE BRIEF [CIRCUIT COURT OF PULASKI COUNTY, CR 83-1984, HON. JOHN W. LANGSTON, JUDGE]

APPEAL DISMISSED; MOTION MOOT.

PER CURIAM

In 1984, Ronnie L. Garrett entered a plea of guilty to capital murder and rape. He received a sentence of life imprisonment without parole for the capital murder charge and life imprisonment for the rape charge. Appellant has been in the custody of the Arkansas Department of Correction since that time. Subsequently, appellant filed a petition pursuant to Ark. R. Crim. P. 37.1 seeking postconviction relief. This court upheld the denial of the petition. *Garrett v. State*, 296 Ark. 550, 759 S.W.2d 23 (1988).

In 2006, appellant filed in the trial court a *pro se* petition for writ of *habeas corpus* pursuant to Act 2250 of 2005, codified at Ark. Code Ann. §§16-112-201–07 (Repl. 2006).[1] In his petition, appellant sought to set aside or vacate the judgment entered based upon scientific testing of evidence in support of his claim of actual innocence. The trial court denied the petition without a hearing, and appellant, proceeding *pro se*, has lodged an appeal here from that order.

[1]This act, with an effective date of August 12, 2005, amended Act 1780 of 2001.

Now before us is appellant's *pro se* motion for extension of time to file his brief. We need not consider this motion as it is apparent that appellant could not prevail in this appeal if it were permitted to go forward because he failed to demonstrate a legitimate basis for the writ. Accordingly, we dismiss the appeal and hold the motion moot. This court has consistently held that an appeal from an order that denied a petition for postconviction relief will not be permitted to go forward where it is clear that the appellant could not prevail. *See Pardue v. State*, 338 Ark. 606, 999 S.W.2d 198 (1999) (*per curiam*); *Seaton v. State*, 324 Ark. 236, 920 S.W.2d 13 (1996) (*per curiam*).

Act 2250 of 2005 provides that a writ of *habeas corpus* can issue based upon new scientific evidence proving a person actually innocent of the offense or offenses for which he or she was convicted. *See* Ark. Code Ann. § 16-112-103(a)(1) (Repl. 2006) and sections 16-112-201–207; *see also Echols v. State*, 350 Ark. 42, 84 S.W.3d 424 (2002) (*per curiam*) (decision under prior law).

As revised, there are a number of predicate requirements that must be met under Act 2250 before a circuit court can order that testing be done. *See* sections 16-112-201–203. Of significant importance in the instant matter, the act requires a showing of identity as an issue during the investigation or prosecution when a petitioner contends that he is entitled to post-trial scientific testing on the ground of actual innocence. Section 16-112-202(7). Further, the scientific testing to be sought must establish petitioner's actual innocence. Section 16-112-201(a)(1); *see also Graham v. State*, 358 Ark. 296, 188 S.W.3d 893 (2004) (*per curiam*) (decision under prior law).

In his *pro se* petition, appellant maintained that he is actually innocent of the victim's murder in spite of his plea of guilty, which he contended was coerced. In his prior petition for postconviction relief pursuant to Rule 37.1, this court rejected appellant's argument that ineffective assistance of counsel resulted in a coerced guilty plea. By virtue of his guilty plea, appellant failed

to make a showing that identity was an issue during the investigation or prosecution.

Appellant sought scientific testing of hair that was found on the victim and contended that the hair belonged to one of his co-defendants. The act now requires that the petitioner identify a theory of defense that is not inconsistent with an affirmative defense presented at the trial and would establish the actual innocence of the petitioner. Sections 16-112-202(6)(A) and (B). Here, appellant's current defense of innocence by blaming his co-defendants is wholly inconsistent with his entering a plea of guilty with the trial court.

Moreover, scientific testing of the hair would not absolutely establish appellant's actual innocence. Section 16-112-202(8) requires that the proposed testing produce new material evidence that would support the petitioner's defense as well as raise a reasonable probability that he did not commit the offense. The presence of another person's hair on the victim does not rise to the level of reasonable probability that appellant did not commit this crime, regardless of whether the hair belonged to one of his co-defendants.

The hair that appellant sought to be tested was discussed in deposition testimony given in a federal matter by one of the attorneys who represented appellant on the criminal charges. Section 16-112-202 requires that the evidence to be tested was secured as a result of the conviction and that the evidence is in the possession of the state, subject to a chain of custody and under conditions sufficient to ensure that the integrity of the evidence has been maintained for the purpose of later testing. Sections 16-112-202(1) and (4). In his petition, appellant failed to show that any of these requirements had been met. An attorney's vague recollection of evidence collected by the State does not rise to the level of showing that the evidence was, and still is, in the State's possession, subject to a proper chain of custody, and in adequate condition to be scientifically tested.

Appeal dismissed; motion moot.

Glaze, J., not participating.